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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

MARVIS DOUGHTY

Petitioner

versus

ZOECON CORPORATION

Respondent

On Writ of Certiorari to the
United States Court of Appeals for the
Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court may dismiss a case for want of subject matter jurisdiction without first permitting the proponent of jurisdiction to gather sufficient evidence through discovery to meet the standards and requirements of proof which the federal court has itself established as a prerequisite to the invocation of jurisdiction.

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The Petitioner, Marvis Doughty, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on June 25, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein submitted for review, was not released for publication, but is reprinted in the separate Appendix to this Petition, at page 41. The prior opinion of the United States District Court for the Northern District of Texas was also not reported, but is reprinted in the separate Appendix to this Petition, at page 25.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 25, 1992. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III, Section Two:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; -- to all Cases affecting Ambassadors, other public Ministers and Consuls; -- to all Cases of admiralty and maritime Jurisdiction; -- to Controversies to which the United States shall be

a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same States claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

28 U. S. C. § 1332 (a) (1):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000.00, exclusive of interest and costs, and is between -- citizens of different States;

. . .

STATEMENT OF THE CASE

The instant lawsuit was filed by the Petitioner, Marvis Doughty, to recover damages for personal injuries she sustained.

The defendant corporation challenged the jurisdiction of the United States District Court over the subject matter of the controversy, claiming that Marvis Doughty was a citizen of the state in which it maintained its principal place of business. It supported this claim with an affidavit by its assistant treasurer stating only that the officers of the defendant corporation were residents of Texas, and the legal conclusion that the home office and principal place of business of the defendant corporation was Texas.

The United States Court of Appeals has declared several non-exclusive factors material to the determination of the principal place of business of a corporation, including:

1. The places where the corporation carries on its various activities, weighted by the importance of those activities as determined by:

   A. the proportionate share of corporate assets, both of money and time, devoted to each such activity, and

   B. the proportion of its income that the corporation derives from each such activity;[1]

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[1] *J. A. Olson Co. v. City of Winona, Mississippi*, 818 F. 2d 401, 411 (5th Cir. 1987).

2. Amount of income derived from various assets;[2]

3. Total amount of sales;[3]

4. Percentage of those sales accomplished in various states;[4] and

5. Book value of assets located at various sites.[5]

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[2] *Id.*

[3] *Danos v. Waterford Oil Co.*, 351 F. 2d 940, 941 (5th Cir. 1965).

[4] *Anniston Soil Pipe Co. v. Central Foundry Co.*, 216 F. Supp. 473, 474 (N. D. Ala. 1963), *aff'd* 329 F. 2d 313 (5th Cir. 1964).

[5] *Id.*

Marvis Doughty requested permission to conduct discovery regarding these and other issues pronounced material by the controlling law, and this permission was granted.

The defendant corporation responded by producing some of the requested information, stating that some of the requested information did not exist, and objecting to the production of the remainder, including the information that would reveal the facts regarding the issues set out above.

Marvis- Doughty moved the United States District Court to order the production of the information withheld, but even though it granted part of that motion, it refused to compel the production of the information going to the heart of the issues set out *supra*, including documents such as ledgers, balance sheets, income statements, and state and federal income tax returns. No evidence permitting resolution of these issues was ever made available.

Denied the production of this information, and being a stranger to the corporation,[6] Marvis Doughty was left with no capacity whatsoever to carry her burden of proving the assets possessed and income earned by the corporation, much less the location of those assets and the places where that income was earned. So she failed to prove the location of the principal place of busi-

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[6] *Compagnie des Bauxites Guiness v. L'Union Atlantique S. A. D'assurances*, 723 F. 2d 357, 362 (3rd Cir. 1983) ("A plaintiff who is a total stranger to a corporation should not be required, unless he has been undiligent, to try such an issue [*i. e.*, "doing business" in a state] on affidavits without the benefit of full discovery."), quoting *Surpitski v. Hughes-Keenan Corp.* 362 F. 2d 254, 255-56 (1st Cir. 1966).

ness of the defendant corporation as defined by the controlling judicial decisions.

The United States District Court then dismissed her complaint, citing the affidavit of the assistant treasurer.

And the United States Court of Appeals, citing the information volunteered by the corporation without objection (none of which revealed anything whatsoever about its sales, income, or assets, save realty), affirmed. It explained the affirmance by asserting that the requested information regarding income, sales, and assets could not possibly prove the principal place of business of the corporation to be anywhere other than the state where its corporate officers maintained a residence, where it maintained some corporate offices, and where it owned realty, even though

it paid an unknown amount of income taxes and was registered to do unknown types of business in eight other states.

BASIS FOR JURISDICTION IN THE UNITED STATES DISTRICT COURT

The jurisdiction of the United States District Court for the Northern District of Texas over this case was based on the second section of Article III of the United States Constitution and 28 U. S. C. § 1332 (a) (1).

REASONS FOR ALLOWANCE OF THE WRIT

The power granted by 28 U. S. C. § 1332 (a) (1) is a valuable one which the citizens allocate to themselves[7] by acting through their elected representatives in accordance with the United States Constitution. Such allocation is not subject to restriction, expansion, or modification by any other means.[8] Thus the importance of the issuance of the writ of certiorari.

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[7] *Meredith v. City of Winter Haven*, 320 U. S. 228, 234 (1943) (The purpose of 28 U. S. C. § 1332 (a) (1) " . . . was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts.").

[8] *Railway Co. v. Whitton's Adm'r*, 80 U. S. 270, 288 (1872).

Congress having left the term "principal place of business" undefined, the federal courts are left to give the term its meaning. Similarly, the federal courts must allocate the burden of proof on this issue, and resolve discovery questions regarding this matter. They must do so in a fashion that does not compromise the Constitutional grant of authority to Congress to establish the jurisdiction of the federal courts. So, *e. g.*, the federal courts should not eliminate a Congressionally conferred grant of jurisdiction by requiring proof of something impossible to prove.

But this is exactly what has happened in this case.

In order to exercise the option afforded her by Congress, Marvis Doughty was told to prove something about which she possessed no independent evidence, and about which she was forbidden to discover any evidence from the one party possessing such evidence. Then, when in the absence of discovery she proved to possess no evidence regarding the matters selected by the federal courts, she was denied her Congressionally bestowed option.

So the issues presented by this petition are national in scope, going beyond the outcome of this individual case to the relations between the branches of the National Government. The issues presented by this petition are of sufficient importance for this Court to have addressed them in the past, and are of such importance as to demonstrate that they should be settled by this Court in the exercise of its power of supervision.[9]

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[9] See, *Oppenheimer, Inc. v. Sanders*, 437 U. S. 340, 351 n. 13 (1978) ("[W]here issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues.").

Respectfully submitted,

Michael T. Maher

A P P E N D I X

MEMORANDUM OPINION AND ORDER

United States District Court
for the Northern District of Texas

(March 8, 1991)

Defendant Zoecon Corporation ("Zoecon") moves to dismiss the plaintiff's complaint for lack of jurisdiction, contending the parties are not actually citizens of different states.

I

In her complaint, plaintiff alleges defendant Zoecon is a Delaware corporation with its principal place of business outside the state of Texas. Plaintiff avers she is a Texas citizen. Zoecon now moves to dismiss the complaint on the basis of affidavit evidence that Dallas, Texas has been Zoecon's principal place of business since January 1,

1987 and that all of defendant's corporate officers have been located here since that time. Plaintiff contends additional discovery is required for an adequate response to Zoecon's motion and requests the court to refrain from ruling on the motion until June 1, 1991.

II

A federal court has the power to dismiss for lack of subject matter jurisdiction on any one of "three separate bases: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." Williamson v. Tucker, 645 F. 2d 404, 413 (5th Cir.), cert. denied, 454 U. S. 897 (1981).

In this case the allegations of plaintiff's complaint, if true, are sufficient to establish jurisdiction based on diversity of citizenship. 28 U. S. C. § 1332 (a) (1). The undisputed facts of Zoecon's motion show diversity is lacking. Discovery may reveal the true status of Zoecon's citizenship, thus permitting the court to resolve any disputed facts. The Fifth Circuit has held that, to the extent that a defendant's motion to dismiss raises factual matters, the plaintiff should be permitted to address these factual disputes. Williamson, 645 F. 2d at 414. Accordingly, the court's grants plaintiff until April 8, 1991 to complete discovery regarding defendant's citizenship and file an affidavit, interrogatory answers, or other discovery material in support of diversity. If she cannot justify her contention regarding diver-

sity jurisdiction, she shall advise the court at that time.

SO ORDERED.

March 8, 1991.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

ORDER CONCERNING PLAINTIFF'S MOTIONS TO COMPEL PRODUCTION IN AID OF JURISDICTION

United States District Court
for the Northern District of Texas

(June 26, 1991)

Pursuant to the District Court's Orders of Reference filed on May 9, 1991 and May 13, 1991, came on to be heard on June 11, 1991, Plaintiff's First, Second, Third and Fourth Motions to Compel Answers to "Plaintiff's First Request for Production in Aid of Jurisdiction". Having considered the pertinent pleadings and arguments of the parties, the Court issues the following Order.

IT IS ORDERED:

1. With respect to Plaintiff's First Motion to Compel Production of Documents in Aid of Jurisdiction seeking ledgers (Request No. 2), balance sheets

(Request No. 11), journals (Request No. 13), federal income tax returns (Request No. 20) and income statements (Request No. 22), that said requests are hereby DENIED. With respect to the production of State Income Tax Returns (Request No. 14), Defendant is hereby ordered to produce by June 21, 1991, the heading portion, only, of all State Income Tax Returns filed by Zoecon Corporation for the years 1989 and 1990.

2. With respect to Plaintiff's Second Motion to Compel Production of Documents in Aid of Jurisdiction, Defendant is ordered with respect to Request Number 3, seeking the production of worker's compensation insurance policies, to produce an affidavit from the appropriate Zoecon official, setting out in detail, the names of the parties to any such policies, including the names

and locations of any insurance companies which carried worker's compensation insurance for Zoecon Corporation during the years 1989 and 1990. With respect to Request Number 6, seeking pension plans, and Request Number 12, seeking health insurance plans, Defendant is ordered to produce, in affidavit form, the names of all parties to such plans, the states where the parties are located, the name of the administrator of such plan, the state in which the administrator and employees are covered by such plans. Such information must be produced by June 21, 1991.'

3. With respect to Plaintiff's Third Motion to Compel Production of Documents in Aid of Jurisdiction seeking minutes of shareholders meetings (Request No. 4), minutes of board of directors meetings (Request No. 7), and

minutes of executive committee meetings (Request No. 15), Plaintiff's request is hereby DENIED.

4. With respect to Plaintiff's Fourth Motion to Compel Answers to Interrogatories in Aid of Judgment, seeking responses tc Interrogatories Numbers 6, 7, 8 and 9, Defendant is hereby ordered to answer said Interrogatories completely. It is further ordered that a protective order be issued prohibiting Plaintiff or her counsel from disclosing any information contained in response to Interrogatories Number 7 and 9, to anyone except Plaintiff and her counsel, unless modified by further order of the Court. Such answers must be produced by June 21, 1991.

5. All other relief not expressly granted herein is hereby denied.

ENTERED this 26th day of June, 1991.

UNITED STATES MAGISTRATE JUDGE

O R D E R

United States District Court
for the Northern District of Texas

(October 24, 1991)

Defendant Zoecon Corporation ("Zoecon") moves the court to dismiss the complaint of plaintiff Marvis Doughty for lack of jurisdiction. The court now grants the motion.

Zoecon's motion, originally filed January 22, 1991, alleges its principal place of business is Dallas, Texas and thus it is a Texas citizen. Zoecon presents evidence supporting its allegation in the form of an affidavit of Frank V. Jusich, Zoecon's assistant treasurer. Zoecon claims therefore that this court lacks subject matter jurisdiction due to a lack of diversity between the parties.

Doughty responded to the motion with a request for discovery time to explore Zoecon's citizenship allegation. The court granted Doughty's request in a memorandum opinion dated March 8, 1991 and agreed not to rule on Zoecon's motion until June 1, 1991. In an agreed order date May 23, 1991, the court subsequently extended the deadline to September 2, 1991.

The deadline now having passed, Doughty has failed to come forward with evidence to support diversity. The undisputed facts of Zoecon show that diversity is lacking. The court therefore lacks subject matter jurisdiction over Doughty's claims and dismisses this action without prejudice. The clerk of the court shall consider this civil action closed.

SO ORDERED.

October 24, 1991.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

JUDGMENT

United States District Court
for the Northern District of Texas

(January 22, 1992)

For the reasons set out in memorandum opinions and orders filed March 8, 1991 and October 24, 1991, this action is dismissed without prejudice at plaintiff's cost.

Done at Dallas, Texas this 22nd day of January, 1992.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

OPINION

United States Court of Appeals
for the Fifth Circuit

(June 25, 1992)

Marvis Doughty, a Texas citizen, brought suit against Zoecon Corporation in federal district court, alleging that the district court had diversity jurisdiction. Zoecon contested jurisdiction, arguing that it was a citizen of Texas because its principal place of business was in Texas. The district court dismissed Doughty's suit because she failed to present any evidence that Zoecon's principal place of business was in a state other than Texas.

On appeal, Doughty argues that the district court erred in dismissing her suit. She further contends that the district court should have compelled

Zoecon to produce certain documents that she argues are relevant to the determination of Zoecon's principal place of business.

We hold that the district court did not err in dismissing her complaint. We further hold that the district court did not abuse its discretion in refusing to compel Zoecon to produce certain requested documents. We therefore affirm the district court's dismissal.

I

On December 18, 1990, Marvis Doughty, a Texas resident, brought suit against Zoecon Corporation in federal district court. In her complaint, Doughty alleged that the district court had diversity jurisdiction because Zoecon was incorporated in Delaware and had its principal place of business in a

state other than Texas. On January 22, 1991, Zoecon filed a motion to dismiss, alleging that the court lacked diversity jurisdiction because its principal place of business was in Texas. Zoecon attached an affidavit to its motion, in which an assistant treasurer of the corporation stated that Zoecon's principal place of business was located in Texas.

Doughty filed a motion contending that she needed additional discovery in order to respond to Zoecon's motion. On March 8, 1991, the district court granted her motion, allowing her to conduct discovery until April 8, 1991, and directing her to file any material in support of diversity at that time. Doughty then filed four motions to compel Zoecon to respond to requests for document production and to respond to interrogatories. The district court re-

ferred the motions to compel to a United States magistrate judge pursuant to 28 U. S. C. § 636. Next, Doughty filed a motion to extend time to resolve the jurisdiction issue. On May 23, 1991, the district court, noting that Zoecon agreed to the motion, extended the deadline for presentation of evidence regarding subject matter jurisdiction to August 5, 1991 and stated that the motion to dismiss would be considered ripe on September 2, 1991. On June 26, 1991, the magistrate judge entered his order directing Zoecon to produce some of the requested documents and answer the interrogatories. The magistrate judge did, however, refuse to compel Zoecon to produce some of the requested documents.

On October 24, 1991, the district court granted Zoecon's motion to dismiss for lack of subject matter jurisdiction.

The court stated that Doughty had failed to present any evidence supporting diversity jurisdiction and that the undisputed facts showed that diversity was lacking. Doughty now appeals.

II

On appeal, Doughty argues that the district court erred in dismissing her case for lack of subject matter jurisdiction. She further argues that the district court's refusal to grant in full her motions to compel discovery deprived her of her constitutional right to assert a claim in federal court. Doughty claims that she requested materials relevant to determining Zoecon's principal place of business and that the district court erred in refusing to compel Zoecon to produce them.

III

A

Doughty argues that the district court erred in dismissing her complaint for lack of subject matter jurisdiction. Under 28 U. S. C. § 1332 (c), a corporation is deemed to be a citizen of both the state of its incorporation and the state of its principal place of business. If Zoecon's principal place of business is in Texas, then the district court does not have subject matter jurisdiction because there is no complete diversity between the parties. A trial court's determination of the principal place of business of a corporation is limited by the clearly erroneous test. Village Fair Shopping Center Co. v. Sam Broadhead Trust, 588 F. 2d 431, 434 (5th Cir. 1979). The party invoking federal

jurisdiction bears the burden of proof if diversity is challenged. Id. at 433.

Zoecon contested diversity and submitted an affidavit supporting its position that its principal place of business was in Texas. Doughty failed to present any evidence supporting diversity within the time period set by the district court. Therefore, the district court's finding that Zoecon's principal place of business was in Texas was not clearly erroneous. Doughty failed to bear her burden of proof. The district court did not err in dismissing the case for lack of subject matter jurisdiction.

B

Doughty also contends that the magistrate erred in refusing to compel Zoecon to produce all of the requested documents. We review the district court's

discovery rulings for abuse of discretion. Coughlin v. Lee, 946 F. 2d 1152, 1158 (5th Cir. 1991). The trial court has wide discretion in determining the scope and effect of discovery. Pan-Islamic Trade Corp. v. Exxon Corp., 632 F. 2d 539, 550 (5th Cir. 1980), cert. denied, 454 U. S. 927 (1981).

Under Federal Rule of Civil Procedure 26 (b), the scope of discovery is broad:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> The frequency or extent of use of discovery methods . . . shall be limited by the court if it determines that: (i) the discovery sought is unrea-

> sonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Zoecon originally produced all contracts for the lease of property to which it was a party, all deeds that named it as the owner of any interest in realty, advertisements, organizational charts, and all policies of casualty insurance to which it was a party. Zoecon was also ordered to produce information regarding workers' compensation insurance policies, pension plans, and health insurance plans for any employees. Zoecon was also ordered to answer interrogato-

ries concerning any bank accounts and loans. The magistrate judge denied Doughty's motion to compel Zoecon to produce the following documents: (1) all corporate ledgers that covered 1986-1990; (2) all shareholder meeting minutes from 1986-1990; (3) all balance sheets from 1986-1990; (4) all board of directors meetings minutes; (5) any position statements from 1986-1990; (6) any corporate journals from 1986-1990; (7) all executive committee meeting minutes; (8) all federal income tax returns from 1986-1990; (9) any corporate income statements from 1986-1990; and (10) any contracts to which Zoecon and a labor union were parties to during 1986-1990. Doughty also requested state income tax returns from 1986-1990. The magistrate judge ordered Zoecon to produce the state income tax headings for 1989 and 1990.

This court applies the "total activity" test to determine the principal place of business. J. A. Olsen Co. v. Winona, 818 F. 2d 401, 404 (5th Cir. 1987). This test incorporates the "nerve center" test and the "place of activity" test. Id. The general rules of these component tests are as follows: (1) when considering a corporation whose operations are far flung, the sole nerve center of that corporation is more significant in determining principal place of business; (2) when a corporation has its sole operation in one state and executive offices in another, the place of activity is regarded as more significant; and (3) when the activity of a corporation is passive and the "brain" of the corporation is in another state, the situs of the corporation's "brain" is given greater significance. Id. at 411.

When the magistrate judge was considering Doughty's motion to compel, he had before him Zoecon's answers to Doughty's first interrogatories, which indicated the following: (1) Zoecon was engaged in developing, manufacturing, and marketing novel chemical agents for the control of insects; (2) Zoecon owned real estate only in Dallas; (3) Zoecon paid property taxes only in Texas; (4) Zoecon was registered to do business in eight states including Texas; (5) Zoecon's main or home office was located in Dallas; (6) Zoecon's executive office was located in Dallas; (7) all of the corporate officers resided in the Metroplex; (8) Zoecon's only manufacturing facility was located in Dallas; (9) Zoecon's only research and development facility was located in Dallas; (10) Zoecon filed income tax returns in eight states; and (11) Zoecon filed sales

taxes only in Texas. Based on this information, it is clear that Zoecon's principal place of business is in Texas. Therefore, the magistrate judge did not abuse his discretion in refusing to compel Zoecon to produce the requested documents since, in the light of the other evidence, the requested documents were not necessary to determine Zoecon's principal place of business.

IV

In conclusion, we hold that the district court did not err in dismissing the case for lack of subject matter jurisdiction. Doughty failed to present any evidence that Zoecon's principal place of business was in a state other than Texas. Doughty thus failed to prove there was complete diversity between the parties. Furthermore, we hold

that the district court did not abuse its discretion in refusing to compel Zoecon to produce certain documents, since, in the light of the other evidence, those documents could not have proved that Zoecon's principal place of business was in a state other than Texas. The district court's dismissal is therefore

A F F I R M E D.